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APR 6 - 2007
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SUPREME COURT, U.S.

(3)

No. 06-1220

In the Supreme Court of the United States

SAMANTHA BATES,

Petitioner,

v.

CHARTER TOWNSHIP OF VAN BUREN,
a Michigan municipal corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

1. DID THE SIXTH CIRCUIT COURT PROPERLY AFFIRM, ON RES JUDICATA GROUNDS, THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S FEDERAL CHALLENGING A NUDITY ORDINANCE PROHIBITING BAR OWNERS FROM ALLOWING NUDE DANCING ON THEIR PREMISES WHEN VIRTUALLY IDENTICAL CONSTITUTIONAL CHALLENGES WERE PREVIOUSLY RAISED BY THE BAR WHERE PETITIONER PERFORMED AS AN EXOTIC DANCER AND THE STATE COURTS REJECTED THE BAR OWNER'S CLAIMS, FINDING THE ORDINANCE CONSTITUTIONAL?

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STATEMENT OF THE CASE

This Petition involves the constitutionality of a Township ordinance prohibiting nudity in establishments that serve alcohol. Petitioner is an exotic dancer who is challenging the ordinance on grounds that it limits, among other things, her rights of Free Speech. Petitioner's claims were properly dismissed from the federal courts on res judicata grounds because the same constitutional claims were previously raised in Michigan state courts by the business establishment where Petitioner performed as an exotic dancer.

As a threshold matter, Respondent notes that while Petitioner has adequately informed this Court of the procedural timeline of the numerous proceedings in this action, Petitioner provides little detail regarding the exact nature of the claims previously litigated by the business establishment which previously challenged the nudity ordinance. Because the central issue presented in this appeal pertains to the establishment (or negation) of the substantial identity of interests between the litigation involving the business establishment where Petitioner danced and Petitioner's instant claims, it is necessary to provide background information related to the previous litigation. As will be demonstrated below, Petitioner's interests were more than adequately protected in the previous litigation and her claims were exposed as nothing more than forum shopping for a federal venue in an attempt to prolong litigation. Accordingly, the Sixth Circuit properly affirmed the dismissal of her claims on res judicata grounds.

I. Background

A. "*Garter Belt I*" Initiated by the Business Establishment Where Petitioner Performed as an Exotic Dancer

Garter Belt Inc, d/b/a Leggs Lounge, ("Garter Belt," "bar" or "business establishment") owned and operated a bar in Respondent Township that featured nude dancing and was licensed by the Michigan Liquor Control Commission (LCC). In March 1999, Respondent enacted Ordinance No. 02-16-99(2) (§ 6-69 of Respondent's code of ordinances) (Cert. Petition App. H at pp. 31a-32a). The ordinance was worded identically to a neighboring Michigan Township ordinance that the Michigan Court of Appeals, in *Jott, Inc v Clinton Charter Twp*, 224 Mich App 513, 548; 569 NW2d 841 (1997), held "constitutionally valid and enforceable."

> § 6-69, titled "Nudity on Licensed Premises," provides in relevant part:
>
> (1) No person, while appearing in a state of nudity as defined in this section, shall frequent, loiter, work for or perform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the provisions of this section.
>
> (2) "Nudity" shall be defined to be the exposure by view of persons, of any of the following body parts, either directly or indirectly, including but not limited to exposure, see-through clothing articles or body stockings:

(a) the whole or part of the pubic region;
(b) the whole or part of the anus;
(c) the whole or part of the buttocks;
(d) the whole or part of the genitals;
(e) the breast area including nipple, or more than one half of the area of the breast.

(Cert. Petition App. H at p. 31a).

After Garter Belt failed to comply with § 6-69, Respondent in November 2000, sued in Wayne Circuit Court (*Garter Belt I*), seeking to enjoin Garter Belt from featuring nude dancing that violates the ordinance. (Cert. Petition App. I at pp. 33a-38a). Garter Belt answered and, by affirmative defenses and a counterclaim, sought to have the ordinance declared unconstitutional.

B. "*Garter Belt I*" Removed from State Court to Federal Court and Parallel Federal Litigation Begins in "*Garter Belt II*"

In response to the Respondent's Township's filing of its injunctive action in *Garter Belt I*, the Garter Belt, did two things. First, it removed *Garter Belt I* to federal court. (Cert. Petition App. J at pp. 39a-44a). Second, the Garter Belt filed a separate cause of action under 42 U.S.C. 1983 in the U.S. District Court for the Eastern District of Michigan (*Garter Belt II*) challenging the constitutionality of the Nudity on Licensed Premises ordinance. (Cert. Petition App. at K pp. 45a-90a). The removed state case and the Garter Belt's separate federal case were consolidated. Respondent Township then filed a Motion for Abstention which, after extensive briefing, was granted. (Cert. Petition App. O at p. 100a). As a result, the federal court action, *Garter Belt II* was dismissed in June 2001 on abstention grounds without

prejudice (Cert. Petition App. O at p. 100a) and the Wayne County Circuit Court action, *Garter Belt I,* was remanded to state court in January 2001. (Cert. Petition App. M at pp. 94a-96a). Garter Belt appealed the dismissal of *Garter Belt II* to the Sixth Circuit Court of Appeals, which affirmed in June 2003 (Cert. Petition App. N at pp. 97a-106a).

C. *Garter Belt I* Proceedings after Remand

Meanwhile, *Garter Belt I*, following remand, proceeded in Wayne Circuit Court, where Garter Belt reasserted its affirmative defenses and counterclaim to have the ordinance declared unconstitutional. **Garter Belt argued, among other things, that (1) nude dancing is a form of expression protected by the First Amendment, US Const, Am I, (2) that Respondent improperly enacted its ordinance without proof that Garter Belt's operations caused any adverse secondary effects, (3) that subsequent decisions of this Honorable Court superseded *Jott*, (4) that the ordinance was overbroad,[1] and (5) that the ordinance was vague**. The Wayne Circuit Court disagreed and on December 11,

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[1] In arguing that the ordinance was overbroad, Garter Belt contended that the township's prohibition of nudity in establishments that serve alcohol was unconstitutionally overbroad because it bans even plunging necklines and thongs and "legitimate" nude or seminude theatrical performances (*Hair*, *Oh! Calcutta*, *Salome*, and *Dance*). Garter Belt also argued that the ordinance does not distinguish between male or female nudity and argues that the ordinance even extends to exposure of body parts in the restroom of any bar in the township. In addition, Garter Belt asserted that a ban on nudity must be no greater than necessary to address harmful secondary effects and that restrictions beyond "pasties and G-strings" limit the erotic message of dancers, rendering the ordinance overbroad. (App A).

2001, granted of summary disposition to Respondent and issued a permanent injunction enjoining the Garter Belt from violating the ordinance. After an extensive analysis of each of Garter Belt's constitutional claims, the Michigan Court of Appeals affirmed. *Van Buren Twp v The Garter Belt, Inc.*, 258 Mich App 594; 673 NW2d 111 (2003). (App A). The Michigan Supreme Court denied Garter Belt's application for leave to appeal (Cert. Petition App. V at p. 208a) and this Court denied Garter Belt's subsequent petition for writ of certiorari. See United States Supreme Court Docket No. 04-426.

II. Petitioner's Instant Claims

On September 16, 2002, while *Garter Belt I* was pending in state court, Petitioner filed a 42 U.S.C. 1983 action in the United States District Court for the Eastern District of Michigan, seeking damages and challenging the constitutionality of the ordinance pursuant to her First, Fourth, Fifth and Fourteenth Amendment rights. (Cert. Petition App. P at pp. 110a-129a). Following cross-motions for summary judgment, the District Court dismissed Petitioner's case without prejudice on abstention grounds, citing *Colorado River Water Conservation Dist v United States*, 424 U.S. 800 (1976). (Cert. Petition App. G at pp. 19a-30a). The Sixth Circuit affirmed but modified the dismissal order to require a stay of proceedings (Cert. Petition App. F at pp. 8a-18a). Once this Court denied Garter Belt's petition for writ of certiorari in Docket No. 04-426, *supra*, Petitioner filed a motion to lift the stay and allow supplemental briefing. (Cert. Petition App. W at pp. 209a-2118a). The district court lifted the stay and requested that the parties address "the issue of the impact of the state court's decision on Bates' claim and whether any doctrine(s) bar(s) Bates from litigating her claims in this forum" (Cert. Petition

App X at pp. 212a-218a). The district court determined that res judicata barred Petitioner's claim and dismissed the case with prejudice (Cert. Petition App D at p. 6a). The Sixth Circuit, in a split decision, affirmed (Cert. Petition Supp App HH at pp. 243a-269a). Petitioner's motion for rehearing was denied. (Cert. Petition App A at p. 1a)

REASONS FOR DENYING REVIEW

I. THE DISTRICT COURT DID NOT ERR WHEN IT DETERMINED THAT RES JUDICATA BARS THIS ACTION

The critical inquiry in this case is whether Petitioner and the Garter Belt were in sufficient privity to impose the rule of res judicata under Michigan law. The central case in this inquiry is the Michigan Supreme Court's decision in *Adair v State of Michigan*, 470 Mich. 105; 680 N.W.2d 386 (2004). In *Adair*, the Court held that res judicata applies not only when the parties to litigation are identical to the parties in prior litigation, but also where the parties are different but have a "'substantial identity of interests' that are adequately presented and protected by the first litigant." 470 Mich at 122. Petitioner in this case disputes that there was a substantial identity of interests between her and The Garter Belt, and she denies that her interests were adequately presented and protected by The Garter Belt. Respondent maintains that there was a substantial identity and that the Garter Belt adequately pursued the interests of its dancers when it unsuccessfully challenged the ordinance on the same constitutional grounds presented by Petitioner. The district court agreed with respondent, and ruled that res judicata precluded Petitioner's action.

The record demonstrates that that the ordinance at issue here was precisely the same ordinance at issue in the state court action. The same Nudity on Licensed Premises ordinance was the only ordinance at issue when The Garter Belt, Inc. took its appeal from the Wayne County Circuit Court to the Michigan Court of Appeals, which affirmed the Wayne County Circuit Court's entry of a Judgment and Permanent Injunction in favor of the Respondent Township and found the ordinance to be constitutionally compliant in full when it issued its published opinion, in *Garter Belt I.*, 258 Mich App 594 (2003). The Nudity on Licensed Premises Ordinance also formed the sole basis for application for leave to appeal *Garter Belt I.*, to the Michigan Supreme Court on June 24, 2004. Finally, the Nudity on Licensed Premises ordinance also was the only matter at issue when The Garter Belt, Inc. filed its Petition for a Writ of Certiorari to this Honorable Court.

Now before this Court is a situation where a state court decision comes first in time and is followed by a second federal action dealing with precisely the same subject matter. In situations such as this, state law determines whether the first decision will have preclusive effect. See *Boone v Spurgess*, 385 F.3d 923, 934 n.4 (6th Cir. 2004) and *United States v Dominguez*, 359 F.3d 839, 841 (6th Cir. 2004).

Under Michigan law, res judicata precludes a second, subsequent action on the same claim when the prior action was decided on the merits, both actions involve the same parties or their privies and the matter in the second action was or could have been resolved in the first action. See *Adair, supra* at 121. The Court in *Adair* noted that the parties need not be identical, as long as a new party is in privity with an old party:

> To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert. *Baraga Co. v State Tax Comm.*, 466 Mich. 264, 269-270, 645 N.W.2d 13 (2002). The outer limit of the doctrine traditionally requires both a "substantial identity of interests" and a "working functional relationship" in which the interests of the nonparty are presented and protected by the party in the litigation. *Id.*, quoting *Baraga Co. v State Tax Comm.*, 243 Mich App. 452, 456, 622 N.W.2d 109 (2000), citing *Phinisee v Rogers*, 229 Mich App. 547, 553-554, 582 N.W.2d 852 (1998). In litigation concerning the MOS or POUM provisions of the Headlee Amendment, Const. 1963, art. 9, § 29, where a taxpayer or a local unit of government is suing the state, the issue is whether the Legislature's act is unconstitutional as it applies not just to a single local unit of government, but to all local units affected by the legislation. In such cases, the interests of all similar local units of government and taxpayers will almost always be identical. If the relief sought by one plaintiff to remedy a challenged action is indistinguishable from that sought by another, such as when declaratory relief is sought concerning an act of the Legislature establishing the proportion of state funding for local government units, the interests are identical.

So, for the purposes of the second factor stated above, a perfect identity of the parties is not required. All that is required is a "substantial identity of interests" that are adequately presented and protected by the first litigant. On that point, the *Adair* Court went on to state,

> "We find that the interests of the current plaintiffs were, for Headlee purposes, adequately represented by the plaintiffs in *Durant I*. The taxpayer parties all have the same interest: that mandated activities are funded as they are required to be under the Headlee Amendment. These interests were presented and protected by the extensive and thorough litigation that occurred in *Durant I*. Thus, we find the current taxpayer plaintiffs are in privity with the *Durant I* plaintiffs." [470 Mich at 122-123 (footnotes omitted).]

Clearly, the Petitioner here, a topless dancer in the very same bar that also challenged the exact same ordinance through Michigan state courts to the U.S. Supreme Court, has not just "substantially identical interests" but exactly the same interests as have been litigated in full. As the Michigan Court of Appeals decision (App 1b) clearly indicates, the Garter Belt raised the very same claims in state court that Petitioner pursued in federal court.

Thus, contrary to Petitioner's claim that the interests of the Garter Belt are independent, the arguments presented below show that the claims are interconnected. This is true not only because of the economic relationship between them, but also because of the wording of the ordinance. Section 1 of the ordinance states:

> No person, while appearing in a state of nudity as defined in this section, shall frequent, loiter, work for or perform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the provisions of this section.

The ordinance – in a single section – (A) prohibits certain displays of nudity by persons and (B) prohibits certain business establishments from allowing such persons to be present while violating the ordinance. When the Garter Belt sought to overturn the ordinance, it was seeking to employ strippers. The necessary analysis of the ordinance required the courts to determine first whether the strippers were protected in their activities, and then to determine whether the establishment could be prohibited from allowing them to dance nude on the premises. Therefore, the Garter Belt needed judicial authority for its strippers to do their dancing, i.e. the Michigan state courts first had to determine whether the ordinance unconstitutionally restricted those strippers from engaging in protected activity. Similarly, Petitioner needed federal judicial authority to continue her exotic dancing, i.e., the federal courts would also determine whether the ordinance unconstitutionally restricted strippers from engaging in protected activity. In both actions, the courts were asked to view the identical activity (dancing) by the identical persons (strippers working at The Garter Belt) and determine whether the strippers' activities were constitutionally protected under the First Amendment. (See App 1b and Cert. Petition App D at p. 6a).

The identity of interests is also shown by the facts. Petitioner is a dancer at The Garter Belt She was a dancer at that establishment when *Garter Belt I* was litigated. If Garter Belt had succeeded in that case, Petitioner would have directly benefited from the ruling. Conversely, when the Garter Belt failed in its challenges, Petitioner was negatively affected. Petitioner's attorney also represented the Garter Belt in a separate but connected action in the district court. (See Cert. Petition App U at p 206a). Accordingly, Petitioner's claims were properly dismissed under res judicata.

II. THIS COURT SHOULD DECLINE TO REVIEW CLAIMS NOT PREVIOUSLY ADDRESSED BY THE FEDERAL COURTS BELOW.

Petitioner also argues that changes in the law preclude application of res judicata and that the Sixth Circuit improperly refused to apply *Richards v Jefferson County*, 517 US 793 (1996) (holding that "extreme" applications of res judicata deprive parties of Fourteenth Amendment protections). However, these issues were never addressed by the federal courts below and this Court should decline to address issues that were not raised below nor addressed by the court. *Howell v Mississippi*, 543 U.S. 440, 160 L.Ed.2d 873, 125 S.Ct. 856 (2005).

CONCLUSIONS

Petitioner does not present a "compelling" case for review by this Court Moreover, the Petition does not present a substantial question of constitutional law that has not been previously reviewed by this Court nor does it present any conflicts between various jurisdictions. At best, it raises an isolated claim of a federal question which was comprehensively reviewed by the Michigan Court of Appeals. The Court should therefore deny Petitioner's petition because the case does not qualify for or otherwise merit review in this Court. Respondent therefore, respectfully requests that this Court deny the petition and decline to remand the case for further review.

Respectfully submitted,

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Dated: April 6, 2007

APPENDIX

APPENDIX A

673 N.W.2d 111, 258 Mich.App. 594, 673 N.W.2d 111

Court of Appeals of Michigan.
Charter TOWNSHIP of VAN BUREN,
Plaintiff-Appellee,

v.

GARTER BELT INC., d/b/a Legg's Lounge,
Defendant-Appellant.

Docket No. 238571.

Submitted Sept. 16, 2003, at Detroit.
Decided Sept. 25, 2003, at 9:00 a.m.
Released for Publication Nov. 26, 2003.

Background: Township sought permanent injunction against liquor establishment, enforcing the township's ordinance prohibiting nudity at establishments licensed to sell alcohol. The Circuit Court, Wayne County, John D. O'Hair, J., granted the injunction and entered summary disposition for township. Establishment appealed.

Holdings: The Court of Appeals, Markey, P.J., held that:

(1) there was no basis for disqualification of trial judge;

(2) State did not preempt local regulation of nudity;

(3) ordinance was a content-neutral time, place, and manner regulation designed to serve a substantial governmental interest in preserving the quality of urban life while allowing for reasonable alternative avenues of communication;

(4) permanent injunction enforcing township's ordinance was not a "prior restraint" of expression protected by the First Amendment;

(5) ordinance was not unconstitutionally overbroad; and

(6) ordinance was not unconstitutionally vague.

Affirmed.

*595 Sommers, Schwartz, Silver & Schwartz, P.C. (by Patrick B. McCauley, David J. Szymanski, and Patrick Burkett), Southfield, for the plaintiff.

Rubin & Rubin, P.L.L.C. (by Allan S. Rubin), and Shafer & Associates, P.C. (by Bradley J. Shafer), Southfield, Lansing, for the defendant.

Before: MARKEY, P.J., and MARK J. CAVANAGH and SAAD, JJ. MARKEY, P.J.

Defendant Garter Belt, Inc., appeals by right the trial court's order granting plaintiff, Charter Township of Van Buren, summary disposition and a permanent injunction enforcing the township's ordinance prohibiting nudity at establishments licensed to sell alcohol. Defendant also appeals the denial of its motion to vacate the judgment and disqualify the trial judge. We first find that no abuse of discretion occurred with regard to the denial of defendant's motion for judicial disqualification and conclude that due

process does not require disqualification under *596 the totality of the circumstances presented in this matter. We also hold that state law does not preempt the township's ordinance because we conclude that the Legislature did not intend its regulation of nudity at establishments licensed to sell alcohol to change the longstanding broad authority of local governments to regulate liquor trafficking within their jurisdiction. We consider last defendant's constitutional **117 claims.[1] We hold that both Van Buren Township's ordinance and the permanent injunction are constitutionally valid.

I. Summary of Material Facts and Proceedings

Defendant owns and operates a bar in Van Buren Township that features nude dancing and is licensed by the Michigan Liquor Control Commission (LCC). In March 1999, Van Buren Township enacted Ordinance No. 02-16-99(2) (§ 6-69 of plaintiff's code of ordinances), which prohibits persons "appearing in a state of nudity" from frequenting, loitering, working, or performing in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. It is not disputed that defendant featured nude dancing long before the adoption of § 6-69 and that Van Buren Township's ordinance is worded identically to that part of a Clinton Township ordinance that this Court held "constitutionally valid and *597 enforceable" in *Jott, Inc. v.*

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[1] We first review nonconstitutional issues "that might obviate the necessity of deciding the constitutional" issues. *Taxpayers of Michigan Against Casinos v. Michigan*, 254 Mich.App. 23, 43, 657 N.W.2d 503 (2002). See also *People v. Riley*, 465 Mich. 442, 447, 636 N.W.2d 514 (2001) ("constitutional issues should not be addressed where the case may be decided on nonconstitutional grounds").

Clinton Charter Twp., 224 Mich.App. 513, 548, 569 N.W.2d 841 (1997).

After defendant failed to comply with § 6-69, plaintiff sued, seeking to enjoin defendant from featuring nude dancing that violates the ordinance. Defendant answered and, by affirmative defenses and a counterclaim, sought to have the ordinance declared unconstitutional. Plaintiff moved for summary disposition, arguing that the ordinance was not a complete ban on nude entertainment, but, instead, was a valid liquor control ordinance designed to combat known adverse secondary adverse effects associated with the combination of nudity and the consumption of alcohol. Defendant argued that nude dancing is a form of expression protected by the First Amendment, U.S. Const., Am. I, and that plaintiff improperly enacted its ordinance without proof that defendant's bar caused any adverse secondary effects. Specifically, defendant argued that subsequent decisions of the United States Supreme Court superseded *Jott*.

The trial court disagreed that a legislative body must hold an evidentiary hearing to determine whether a proposed ordinance would further a legitimate governmental interest. Instead, the trial court concluded that a legislative body could consider any material it deems pertinent and may also employ common sense. The court concluded that under the Twenty-first Amendment, U.S. Const., Am. XXI, the state and local units of government have authority to control liquor traffic within their jurisdiction even though such regulation may incidentally affect activity protected by the First Amendment. Finding that the case at bar was controlled by *Jott*, the trial court granted *598 summary disposition to plaintiff and permanently enjoined defendant from violating the ordinance.

On December 28, 2001, this Court denied defendant's motion for a stay of the judgment and the injunction. We denied reconsideration on January 9, 2002. On January 23, 2002, our Supreme Court denied defendant's application for leave to appeal. This Court denied defendant's motion for peremptory reversal on April 18, 2002.

II. Judicial Disqualification

We review for an abuse of discretion the trial court's factual findings on a **118 motion for disqualification, but the application of the facts to the law is reviewed de novo. *Cain v. Dep't of Corrections,* 451 Mich. 470, 503 n. 38, 548 N.W.2d 210 (1996); *Armstrong v. Ypsilanti Charter Twp.,* 248 Mich.App. 573, 596, 640 N.W.2d 321 (2001).

A judge is disqualified when he cannot hear a case impartially. *Cain, supra* at 503, 548 N.W.2d 210. But a party challenging the impartiality of a judge "must overcome a heavy presumption of judicial impartiality." *Id.* at 497, 548 N.W.2d 210. In general, the challenger must prove a judge harbors actual bias or prejudice for or against a party or attorney that is both personal and extrajudicial. MCR 2.003(B)(1); *Cain, supra* at 495, 548 N.W.2d 210; *Armstrong, supra* at 597, 640 N.W.2d 321. Here, the public comments Judge John D. O'Hair purportedly made in 1996 when he was the Wayne County Prosecuting Attorney do not establish the requisite actual bias or prejudice to overcome the presumption of judicial impartiality.

At the hearing on defendant's motion, Judge O'Hair denied having any personal bias or prejudice. He also *599 denied knowing that defendant's owner, who had contributed funds to a "Dump O'Hair" election year effort in 1996, was even involved in this case. Indeed, O'Hair asserted that he

did not take such matters personally and had "long forgotten" events defendant raised until the motion to disqualify was filed after the court had already ruled. Further, O'Hair affirmed that his decision was controlled by the law, and not by any discretionary fact-finding on his part. On review de novo, Chief Judge Michael F. Sapala found that O'Hair had been "a long-time sitting Judge of the Wayne County Circuit Court, blessed with an impeccable reputation with regard to integrity." Chief Judge Sapala also found that comments on public issues attributed to O'Hair while he was the prosecutor five years earlier were insufficient to demonstrate actual bias in light of O'Hair's impeccable reputation. The chief judge's factual findings are reviewed with deference, and the record here does not establish that an abuse occurred in finding that O'Hair was not actually biased or prejudiced. *Cain, supra* at 503, 548 N.W.2d 210.

We also find no merit in defendant's argument that the appearance of bias is too high to be constitutionally tolerated. Due process requires judicial disqualification without a showing of actual prejudice only in the most extreme cases. *Cain, supra* at 497-498, 548 N.W.2d 210. A showing of actual bias is not necessary to disqualify a judge where "'experience teaches that the probability of actual bias ... is too high to be constitutionally tolerable.'" *Crampton v. Dep't of State,* 395 Mich. 347, 351, 235 N.W.2d 352 (1975), quoting *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). Our Supreme Court noted such situations include: (1) where the judge has a pecuniary interest in the outcome;*600 (2) where the judge has been the subject of personal abuse or criticism from the party before him; (3) where the judge is enmeshed in other matters involving the complaining party; or (4) where the judge might have prejudged the case because of having previously acted as an accuser, fact-finder, or initial decision maker.

Crampton, supra at 351, 235 N.W.2d 352. Although not exclusive, the *Crampton* categories should be narrowly interpreted in light of examples provided by the Supreme Court and are "not to be viewed as catch-all provisions for petitioners desiring disqualification." *Cain, supra* at 500 n. 36, 548 N.W.2d 210.

**119 Defendant does not claim that Judge O'Hair held a pecuniary interest in the instant case, but does claim that the other *Crampton* categories apply. But defendant produced only newspaper reports from 1996 showing that defendant's principal owner, who is not a party to the instant case, had been critical of Judge O'Hair's criminal law enforcement activity when the judge was the prosecutor five years earlier. Defendant's owner had also contributed to an anti-O'Hair political fund. According to press reports, O'Hair responded to the attack by stating that he would not be intimidated from enforcing the law. "'The mere fact that a judge has been subjected to press criticism in connection with a case or a party does not necessarily require the judge's disqualification.'" *Cain, supra*PERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=595&FindType=Y&SerialNum=1996119645" at 515, 548 N.W.2d 210, quoting *Illinois v. Coleman,* 168 Ill.2d 509, 541, 214 Ill.Dec. 212, 660 N.E.2d 919 (1995). Here, there was no evidence to contradict Judge O'Hair's claim that he did not know who owned defendant until after rendering his ruling and had not taken long-forgotten criticism personally. Narrowly construed, the *Crampton* "personal abuse" category does not apply.

*601 Similarly, *Crampton* categories three and four, narrowly construed, did not require recusal of Judge O'Hair on the basis of his activity as a prosecutor five years before in enforcing the criminal law and his public comments related to

that activity. Defendant's claims do not demonstrate that Judge O'Hair was "enmeshed" with a party in other matters, or that he had prejudged civil enforcement of a township ordinance regulating establishments that serve alcohol. Generally, a prosecutor is not disqualified from future activity as a judge, unless he had directly participated in the same case, MCR 2.003(B)(3), or directly participated in the prosecution of the defendant within the prior two years, MCR 2.003(B)(4). See *People v. Williams (After Remand),* 198 Mich.App. 537, 544, 499 N.W.2d 404 (1993), and *People v. Delongchamps,* 103 Mich.App. 151, 156, 302 N.W.2d 626 (1981). Also, topics that were once hot topics will cool with the passage of time. *Cain, supra* at 515, 548 N.W.2d 210. And, "'Prior written attacks upon a judge are ... legally insufficient to support a charge of bias or prejudice on the part of a judge toward an author.'" *Id.* at 516 n. 52, 548 N.W.2d 210, quoting *United States v. Bray,* 546 F.2d 851, 858 (C.A.10, 1976). Finally, "[t]he mere fact that a judge has previously expressed himself on a particular point of law is not sufficient to show personal bias or prejudice." *Id.* at 857.

The totality of the circumstances must be examined to determine if the present case is so extreme that due process requires disqualification without proof of actual bias. *Armstrong, supra* at 598, 640 N.W.2d 321. We conclude that the totality of the circumstances, including the *602 suspect timing [2] of the motion after Judge O'Hair had ruled in

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[2] Although defense counsel claimed to be surprised that Judge O'Hair heard plaintiff's motion for summary disposition on November 30, 2001, the trial court record reflects a September 6, 2001, scheduling order signed by Judge O'Hair, acting for and in the absence of Judge Jeanne Stempien. The trial court record also contains a proof of service by mailing the scheduling order to both

plaintiff's favor, *Wayne Co. Jail Inmates v. Wayne Co. Chief Executive Officer,* 178 Mich.App. 634, 665, 444 N.W.2d 549 (1989), does not establish that the probability of actual bias is so high as to require disqualification without a showing of actual bias or prejudice. *Armstrong, supra* at 599, 640 N.W.2d 321. Because Chief Judge Sapala **120 did not abuse his discretion in finding that the presumption of judicial impartiality had not been overcome with a showing that Judge O'Hair was actually biased or prejudiced, error warranting reversal did not occur.

III. State Law Preemption

We review de novo a trial court's ruling on a motion for summary disposition and its resolution of constitutional issues raised. *Id.* at 582, 640 N.W.2d 321. Whether state law preempts plaintiff's ordinance is a question of law involving statutory construction that we also review de novo. *Saginaw Co. v. John Sexton Corp. of Michigan,* 232 Mich.App. 202, 214, 591 N.W.2d 52 (1998).

Defendant, relying on *Nadeau v. Clinton Charter Twp.,* 827 F.Supp. 435 (E.D.Mich., 1992), argues that MCL 41.181, through its definition of "nudity," limits a township to imposing "pasties and G-strings" regulations. Defendant also argues that MCL 436.1916(3) divests counties with a population of ninety-five thousand*603 or more from enacting topless activity regulations broader than those found in state law. We disagree. State law does not preempt local regulation of nudity at establishments licensed to sell alcohol because MCL 436.1916(3) expressly states, in part: "This section is not intended to prevent a local unit of government

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of defendant's cocounsel on September 17, 2001.

from enacting an ordinance prohibiting topless activity or nudity on a licensed premises located within that local unit of government." This Court is also bound by *Jott, supra* at 543-545, 569 N.W.2d 841, which held that a local ordinance identical to plaintiff's neither conflicted with nor was preempted by MCL 41.181. MCR 7.215(J)(1); *Dunn v. Detroit Auto. Inter-Ins Exchange,* 254 Mich.App. 256, 260-261, 657 N.W.2d 153 (2002).

The *Jott* Court held that state law did not preempt Clinton Township from adopting an ordinance nearly identical to the one at issue in this case. *Jott, supra* at 543-545, 569 N.W.2d 841. Although MCL 41.181 conferred general authority on townships to regulate public nudity, the ordinance at issue regulated liquor traffic rather than nudity per se. *Jott, supra* at 544, 569 N.W.2d 841. And the Court found evidence that the Legislature did not intend to preempt local regulation because it had "conferred control over alcoholic beverage traffic in this state on the LCC, which ... has adopted Rule 436.1409(1),[3] explicitly recognizing the authority of local governmental units to prohibit different types of nudity in establishments*604 holding liquor licenses." *Jott, supra* at 544-545, 569 N.W.2d 841. Further, "it has long been recognized that local communities possess 'extremely broad' powers to regulate alcoholic beverage traffic within their bounds through the exercise of their

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[3] 1980 AACS, R 436.1409(1), effective February 3, 1981, provides: "An on-premises licensee shall not allow in or upon the licensed premises a person who exposes to public view the pubic region, anus, or genitals or who displays other types of nudity prohibited by statute or local ordinance." The rule has not been amended or repealed since the adoption of 1998 PA 58, the Michigan Liquor Control Code, MCL 436.1101 *et seq.*, effective April 14, 1998.

general police powers, subject to the authority of the LCC when a conflict arises." *Id.* at 545, 569 N.W.2d 841, citing *Bundo v. Walled Lake,* 395 Mich. 679, 700, 238 N.W.2d 154 (1976), and *Tally v. Detroit,* 54 Mich.App. 328, 334, 220 N.W.2d 778 (1974). So, this Court held that the definition of nudity in MCL 41.181 neither conflicted with nor preempted Clinton Township's ordinance. *Jott, supra* at 545, 569 N.W.2d 841.

**121 With respect to defendant's argument that MCL 41.181 preempts plaintiff's ordinance, *Jott* is binding precedent on this Court. MCR 7.215(J)(1); *Dunn, supra* at 260-261, 657 N.W.2d 153. Defendant's reliance on *Nadeau, supra,* is misplaced because that case addressed the same Clinton Township ordinance at issue in *Jott.* This Court is not bound by federal decisions interpreting Michigan law. *Ryder Truck Rental, Inc. v. Auto-Owners Ins. Co., Inc.,* 235 Mich.App. 411, 416, 597 N.W.2d 560 (1999). Moreover, *Nadeau* was vacated by stipulation of the parties. See *Jott, supra* at 522, 569 N.W.2d 841.

But defendant also argues that the Legislature codified state liquor laws after *Jott* was decided by adopting 1998 PA 58, effective April 14, 1998. Defendant points to § 916 of the Michigan Liquor Control Code (MLCC), MCL 436.1101 *et seq.,* which requires liquor licensees to obtain entertainment, dance, and topless activity permits. MCL 436.1916. Defendant specifically relies on subsection 916(3) of the MLCC, which provides:

> An on-premises licensee shall not allow topless activity on the licensed premises unless the licensee has applied for *605 and been granted a topless activity permit by the commission. This section is not intended to prevent a local unit of government

> from enacting an ordinance prohibiting topless activity or nudity on a licensed premises located within that local unit of government. This subsection applies only to topless activity permits issued by the commission to on-premises licensees located in counties with a population of 95,000 or less. [MCL 436.1916(3).]

Defendant argues that because Van Buren Township is situated in Wayne County with a population number greater than ninety-five thousand the third sentence of subsection 916(3) removes the specific legislative grant of authority to local governments found in the second sentence. In essence, defendant argues that the state has preempted local regulation of nudity in licensed establishments in counties with a population count greater than ninety-five thousand pursuant to the first of four guidelines set forth in *People v. Llewellyn,* 401 Mich. 314, 322, 257 N.W.2d 902 (1977), for determining when the state has preempted local regulation "by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation." The *Llewellyn* guidelines provide a state regulatory scheme preempts local regulation: (1) when state law expressly provides that the state's authority is exclusive; (2) when preemption is implied in legislative history; (3) although generally not sufficient by itself, when the pervasiveness of the state regulatory scheme supports such a finding; and, (4) when the nature of the regulated subject matter demands exclusive state control to achieve the uniformity necessary to serve the purpose or interest of the state. See *606*Rental Prop Owners Ass'n of Kent Co. v. Grand Rapids,* 455 Mich. 246, 257, 566 N.W.2d 514 (1997), and *Llewellyn, supra* at 323-324, 257 N.W.2d 902. Defendant argues that the state has expressed its intention in subsection 916(3) to exclusively

occupy the field of regulating nudity in licensed establishments located in large counties. *See e.g., Michigan Coalition for Responsible Gun Owners v. Ferndale,* 256 Mich.App. 401, 413-414, 662 N.W.2d 864 (2003) (holding that when the Legislature has expressly stated its intent to exclusively occupy a field it is unnecessary to consider the other three *Llewellyn* factors).

Applying well-settled principles of statutory construction, defendant's argument fails. This Court's primary obligation**122 when interpreting a statute is to ascertain and give effect to the intent of the Legislature. *Gladych v. New Family Homes, Inc.,* 468 Mich. 594, 597, 664 N.W.2d 705 (2003). We must presume the Legislature intended the meaning clearly expressed and must enforce a statute as written. *Id.; People v. Morey,* 461 Mich. 325, 330, 603 N.W.2d 250 (1999). Thus, speculation about an unstated legislative purpose must not replace the unambiguous, plain text of a statute. *Gladych, supra.* Where an ambiguity requires interpretation, the statutory language should be construed reasonably, keeping in mind the purpose of the act. *Draprop Corp. v. Ann Arbor,* 247 Mich.App. 410, 415, 636 N.W.2d 787 (2001).

We cannot accept defendant's speculative claim that the third sentence of MCL 436.1916(3) defeats the explicit, expressed intent in the second sentence. *Gladych, supra.* Defendant's construction also contravenes the settled principle that every word, phrase, and clause of a statute be given effect. *Morey, supra* at 330, 603 N.W.2d 250. More important, the Legislature is presumed *607 to be aware of longstanding judicial, see *Jott, supra* at 545, 569 N.W.2d 841, and administrative interpretations, see 1980 AACS, R

436.1409(1),[4] upholding local control of nudity in connection with liquor trafficking. *Gordon Sel-Way, Inc. v. Spence Bros., Inc.*, 438 Mich. 488, 505, 475 N.W.2d 704 (1991); *Consumers Power Co. v. Dep't of Treasury*, 235 Mich.App. 380, 388, 597 N.W.2d 274 (1999). Although aware of the longstanding administrative and judicial deference to local control, the Legislature did not positively revoke the LCC's longstanding rule, nor disapprove this Court's holding in *Jott*. Rather, the Legislature expressly provided that the adoption of § 916 was "not intended to prevent a local unit of government from enacting an ordinance prohibiting topless activity or nudity on a licensed premises located within that local unit of government." MCL 436.1916(3). Parts of a statute must be read in the context of the entire statute so as to produce a harmonious whole, *Macomb Co. Prosecutor v. Murphy*, 464 Mich. 149, 159, 627 N.W.2d 247 (2001). Here, the Legislature granted local units of government the ability to veto any state permit, MCL 436.1916(3). In sum, defendant's interpretation of MCL 436.1916(3) is unreasonable in light of the express language the Legislature used and the longstanding judicial and administrative interpretation approving extremely broad authority of local governments to regulate liquor trafficking. *Jott, supra* at 545, 569 N.W.2d 841.

Although legislative analysis is of limited value in interpreting a statute, *608*Frank W Lynch & Co. v. Flex Technologies, Inc.*, 463 Mich. 578, 587, 624 N.W.2d 180 (2001), a reasonable interpretation of the statute consistent with its express language is set forth in House Legislative Analysis, Third Analysis, HB 4454, July 9, 1998. After commenting on the apparent problem addressed by

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[4] See n. 3.

recodification of liquor control laws, the analysis reads: "In addition, some have proposed adding language to the liquor code to allow local governments more authority to regulate topless entertainment." *Id.*, p. 1. After summarizing the proposed recodification, the analysis provides, in part:

> In addition to the reorganization of sections, the bill would make the following *substantive changes:*
>
> > The bill would create a topless activity permit for on-premise licensees, in addition to the dance and entertainment permits currently issued under departmental rules.... Topless activity would be **123 banned without a topless activity permit in those counties with a population of 95,000 or less. However, a local unit of government would not be prevented from enacting an ordinance to prohibit topless activity or nudity on licensed premises within its jurisdiction. [*Id.*, p. 4.]

We therefore conclude that the Legislature intended through the express language of MCL 436.1916(3) to continue the longstanding broad authority of a local government to regulate liquor traffic within its jurisdiction. Accordingly, we hold that state law does not preempt local regulation of nudity at establishments licensed to sell alcohol.

IV. Constitutional Issues

A. Standard of Review

We review de novo both a trial court's ruling on a motion for summary disposition and its resolution of *609 any constitutional issues raised. *Armstrong, supra* at 582, 640 N.W.2d 321. Statutes and ordinances are presumed to be

constitutional and the burden of proving otherwise rests with the challenger. *Gora v. Ferndale,* 456 Mich. 704, 711-712, 576 N.W.2d 141 (1998); *People v. Boomer,* 250 Mich.App. 534, 538, 655 N.W.2d 255 (2002). Further, we must construe a statute or ordinance as constitutional unless its unconstitutionality is clearly apparent. *Owosso v. Pouillon,* 254 Mich.App. 210, 213, 657 N.W.2d 538 (2002); *People v. Barton,* 253 Mich.App. 601, 603, 659 N.W.2d 654 (2002).

B. Rational Basis Scrutiny of Liquor Regulations

Defendant argues that the trial court erred by applying rational basis scrutiny to liquor control laws as employed by the *Jott* Court in reliance on *California v. LaRue,* 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), and its progeny. *LaRue* held that the Twenty-first Amendment conferred broad powers on the states to regulate sexually explicit entertainment in establishments licensed to sell alcoholic beverages. In particular, defendant argues that *Jott* has been superseded by subsequent decisions of the United States Supreme Court, including *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), and *City of Erie v. Pap's A.M.,* 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), which applied intermediate scrutiny established in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), for expressive conduct protected by the First Amendment. We disagree. *Jott, supra,* binds this Court. MCR 7.215(J)(1). The United States Supreme Court has not clearly repudiated, either in *44 Liquormart, supra,* or *Pap's, supra,* the underlying *610 premise of *LaRue* and its progeny that a state may, in the exercise of its inherent police powers, constitutionally regulate appropriate places where liquor may be sold, including prohibiting nudity at licensed to sell alcohol establishments.

The Supreme Court in *LaRue, supra,* upheld the constitutionality of California's ban on nudity, and real or simulated sexual acts, in establishments licensed to serve alcohol. The *LaRue* Court observed that "the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals." *LaRue, supra* at 114, 93 S.Ct. 390. The Twenty-first Amendment provides, in part: "The transportation or importation into any State ... for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const., Am. XXI. Although not holding that the Twenty-first Amendment superseded other parts of the United States Constitution, the *LaRue* **124 Court nevertheless concluded that "the case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened...." *LaRue, supra* at 115, 93 S.Ct. 390. The Court also concluded that California's determination that the "sale of liquor by the drink and lewd or naked dancing and entertainment" should not occur in the same place was rational. *Id.* at 115, 93 S.Ct. 390. And the Court reasoned that although some of the banned performances "are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board," but rather "has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." *611*Id.* at 118, 93 S.Ct. 390. Thus, the *LaRue* Court held that California's ban on "bacchanalian revelries" at establishments licensed to sell alcoholic beverages did not violate the United States Constitution "[g]iven the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires...." *Id.* at 118-119, 93 S.Ct. 390.

The Supreme Court affirmed its holding in *LaRue* in at least three subsequent decisions: *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981), and *Newport, Kentucky v. Iacobucci*, 479 U.S. 92, 107 S.Ct. 383, 93 L.Ed.2d 334 (1986). In *Doran*, the Court upheld a preliminary injunction against enforcement of a local ordinance that banned topless dancing not only in bars but also in any public place. The Court summarized *LaRue* and held "that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program." *Doran, supra* at 932-933, 95 S.Ct. 2561. But because the ordinance was not limited to bars and no other legitimate state interest was suggested to counterbalance the constitutional protection presumptively afforded to activities within the scope of the ordinance, the preliminary injunction was held to have been properly issued. *Id.* at 933-934, 95 S.Ct. 2561.

In *Bellanca, supra*, the Supreme Court considered a challenge based on the First Amendment to a New York law banning nude dancing at establishments licensed to sell liquor for consumption on the premises. The Court reviewed its decisions in *LaRue* and *612 *Doran*, and concluded that the state of New York had done just what the Court had said a state could do. *Bellanca, supra* at 717, 101 S.Ct. 2599. The Court reasoned that because New York possessed the power to ban the sale of alcoholic beverages entirely it could also ban the sale of liquor on premises where topless dancing occurs. *Id.* While not requiring legislative findings to support the ban, the Court found them in a legislative memorandum that included the observation that "'[c]ommon sense indicates that any form of nudity coupled with alcohol

in a public place begets undesirable behavior.'" *Id.* at 718, 101 S.Ct. 2599. So, the Court held that New York had "chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell liquor for on-premises consumption." *Id.* The Court concluded that New York's policy choice did not violate the United States Constitution given the "'added presumption in favor of the validity of the state regulation' conferred by the Twenty-first Amendment...." *Id.*, quoting *LaRue, supra*PERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1972127220" at 118, 93 S.Ct. 390.

In *Iacobucci,* the city of Newport, Kentucky, enacted an ordinance that prohibited**125 nude or nearly nude dancing in local establishments licensed to sell liquor for consumption on the premises. A challenge to the ordinance under the First and Fourteenth Amendments failed in the federal district court. *Id.* at 92-93, 107 S.Ct. 383. The Sixth Circuit Court of Appeals reversed the holding of the district court, 785 F.2d 1354 (C.A.6, 1986), finding that *Bellanca* did not apply because in Kentucky local voters, not the city or the commonwealth, determine whether alcohol may be sold locally. *Iacobucci, supra* at 94, 107 S.Ct. 383. The Supreme Court disagreed, finding that *Bellanca* controlled because *613 the commonwealth's authority under the Twenty-first Amendment extended to the city. *Id.* at 94, 107 S.Ct. 383. The Court opined:

> In holding that a State "has broad power ... to regulate the times, places, and circumstances under which liquor may be sold," *Bellanca,* 452 U.S., at 715, 101 S.Ct. 2599 this Court has never attached any constitutional significance to a State's division of its

> authority over alcohol. The Twenty-first Amendment has given broad power to the States and generally they may delegate this power as they see fit. [*Iacobucci, supra* at 96, 107 S.Ct. 383.]

This Court, relying on *LaRue* and *Bellanca,* applied rational basis scrutiny to a First Amendment challenge to a Clinton Township ordinance identical in pertinent parts to plaintiff's ordinance. *Jott, supra* at 538, 569 N.W.2d 841. The *Jott* Court found that the parts of the Clinton Township ordinance identical to the Van Buren Township ordinance at issue here were rationally related to the legitimate governmental interest of eradicating the effects of "'"undesirable behavior"'" stemming from a combination of alcohol and nudity. *Id.* at 546, 569 N.W.2d 841, quoting *Bellanca, supra* at 718, 101 S.Ct. 2599 quoting the legislative memorandum relied on in *Bellanca.* After severing invalid parts of the ordinance, this Court held "the remainder of the ordinance constitutionally valid and enforceable." *Jott, supra* at 548, 569 N.W.2d 841.

In *44 Liquormart, supra* at 489, 116 S.Ct. 1495 the Supreme Court held that Rhode Island's statutory prohibition against advertisements containing accurate information about retail prices of alcoholic beverages was invalid because it abridged speech protected by the First Amendment. The *44 Liquormart* Court held that the Twenty-first Amendment did not shield the ban on *614 commercial speech from constitutional scrutiny.[5] *Id.* at 488, 516, 116 S.Ct. 1495. The

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[5] A decade before the Supreme Court decided *44 Liquormart,* this Court held that a ban on advertising liquor prices was an unconstitutional restraint on commercial speech not shielded by the Twenty-first Amendment. *Michigan Beer & Wine Wholesalers*

Court also limited its decision in *LaRue*. "Without questioning the holding in *LaRue*, we now disavow its reasoning insofar as it relied on the Twentyfirst Amendment." *Id.* at 516, 116 S.Ct. 1495. The Court reasoned that because the Twenty-first Amendment did not diminish other provisions of the United States Constitution, including the Supremacy Clause, the Establishment Clause, or the Equal Protection Clause, it would not diminish the First Amendment. *Id.* Nevertheless, the Court opined that "[e]ntirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." *Id.* at 515, 116 S.Ct. 1495. Moreover, a state's inherent police powers "provide ample authority to restrict the kind of 'bacchanalian revelries' described **126 in the *LaRue* opinion regardless of whether alcoholic beverages are involved." *Id.*

In *Jott*, this Court specifically rejected defendant's argument that *44 Liquormart* requires a higher level of scrutiny than rational basis when reviewing a state's exercise of its police powers under the Twenty-first Amendment to regulate appropriate places to sell alcohol. The *Jott* Court opined:

> We reject plaintiff's claim, asserted at oral argument, that the holding in *LaRue* was recently overruled by the Supreme Court in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). Unlike this case, *44 Liquormart* was a "commercial speech" case. It *615 involved a challenge to a state law banning advertisement of

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Ass'n v. Attorney General, 142 Mich.App. 294, 370 N.W.2d 328 (1985).

> retail liquor prices. The Supreme Court expressly noted that laws suppressing speech are subject to greater constitutional scrutiny than laws suppressing forms of conduct. Although the Supreme Court did retreat somewhat from its position in *LaRue*, it did so only insofar as *LaRue* advanced the proposition that the constitutional prohibition against laws abridging freedom of speech embodied in the First Amendment may be shielded from attack by virtue of the Twenty-first Amendment. Indeed, the court expressly stated that it was not questioning its holding in *LaRue*. The Court noted that *LaRue*, unlike the case before it, was not a commercial speech case, but instead concerned the regulation of nude dancing where alcohol was served. The Court expressly stated that its analysis in *LaRue* would have yielded the same result, independent of the Twenty-first Amendment, in light of the state's ample inherent powers to prohibit the sale of alcoholic beverages in inappropriate locations and to restrict the kind of sexual activities described in *LaRue*. For these reasons, we find that *44 Liquormart* does not affect the disposition of this case. [*Jott, supra* at 539 n. 6, 569 N.W.2d 841.]

Jott is binding on this Court. MCR 7.215(J)(1); *Dunn, supra* at 260-261, 657 N.W.2d 153.

We also reject defendant's claim that the Supreme Court's decision in *Pap's A.M., supra,* requires a different result because *Pap's* did not address the issue of where alcohol may be sold but, rather, concerned a general community-wide ban on nudity similar to that considered in *Doran, supra.* Thus, *Pap's* does not call into question the state's exercise of its police power to "prohibit the sale of alcoholic beverages in

inappropriate locations." *44 Liquormart, supra* at 515, 116 S.Ct. 1495; *Jott, supra*LINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=595&FindType=Y&SerialNum=1997151740" at 539 n. 6, 569 N.W.2d 841.

Defendant's argument is also not supported by *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). That case addressed *616 whether the city of Los Angeles could rely on a 1977 study of crime to justify its zoning restrictions on adult entertainment businesses (prohibiting them within one thousand feet of each other or within five hundred feet of a religious institution, school, or public park). *Id.* at 430-433, 441, 122 S.Ct. 1728. The Supreme Court in *Alameda Books* intended to clarify the standard of review for content-neutral time, place, and manner regulations designed to combat adverse secondary effects of businesses that purvey sexually explicit materials. *Id.* at 433-434, 122 S.Ct. 1728; *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49-50, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Content-neutral time, place, and manner regulations are constitutionally valid if they are "designed to serve a substantial governmental interest and [allow] for reasonable alternative avenues**127 of communication." *Id.* at 50, 106 S.Ct. 925; *Jott, supra* at 529, 569 N.W.2d 841.

The plurality opinion in *Alameda Books* concluded that Los Angeles could rely on its 1977 study because it supported the city's theory that a concentration of adult operations in one locale attracts crime. *Alameda Books, supra* at 442, 122 S.Ct. 1728. The Court reasoned that a governmental unit is entitled to rely on "any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Id.* at 438, 122 S.Ct. 1728 citing *Renton, supra* at 51-52, 106 S.Ct. 925 and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584,

111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Souter, J., concurring in judgment). The government meets its burden if the evidence relied on fairly supports its rationale. *Alameda Books, supra* at 438, 122 S.Ct. 1728. If a challenger fails to cast direct doubt on the government's rationale, either by demonstrating that the evidence does not support the rationale of the *617 government or by furnishing evidence that disputes the government's factual findings, the municipality meets the *Renton* standard. *Id.* at 438-439, 122 S.Ct. 1728. If the challenger is successful in raising doubt about the government's rationale, "the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.* at 439, 122 S.Ct. 1728. Importantly, the plurality opinion did not address whether the government must actually consider the evidence supporting its rationale before adopting the regulation. *Id.* at 442, 122 S.Ct. 1728. Rather, the Court left intact its prior holding that the government may support its rationale with studies of the experience of other governments, and on court opinions addressing the same topic. See *Renton, supra* at 51-52, 106 S.Ct. 925.

So, even if plaintiff were required to apply an intermediate level of scrutiny to demonstrate that its ordinance was a content-neutral time, place, and manner regulation designed to serve a substantial governmental interest while allowing for reasonable alternative avenues of communication, it would have met its burden. Plaintiff could reasonably rely on the finding adopted by the Supreme Court and by this Court that "'[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior.'" *Bellanca, supra* at 718, 101 S.Ct. 2599 quoting a legislative memorandum relied on in *Bellanca; Jott, supra* at 546, 569 N.W.2d 841.

Furthermore, Bryce Kelley, the township planner responsible for drafting the ordinance, testified in a deposition that his understanding of the experience of other communities in separating alcohol and nudity was that it created a better community. "A city's *618 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" *Alameda Books, supra* at 444, 122 S.Ct. 1728 (Kennedy, J., concurring), quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion). Kelley also testified that he compared the number of police runs to defendant's bar with the number of police runs to a strip mall containing no adult entertainment establishments and found thirty percent more police runs to defendant's business. Although Kelley testified that he did not present this information to the township board before the adoption of the ordinance, the person who was the township clerk at the time the ordinance was enacted recalled Kelley discussing the issue when the ordinance was being considered.

More importantly, Kelley testified that he sought assistance from a consulting **128 company, McKenna Associates, that prepared a report for the township board concerning several ordinance revisions, including Ordinance No. 02-16-99(2), which regulated sexually oriented businesses. The McKenna report, based on studies from a number of municipalities, summarized adverse secondary effects of sexually oriented businesses, including topless bars: These studies, taken together, provide compelling evidence that sexually oriented businesses are associated with high crime rates and depression of property values. In addition, such businesses can dramatically change the character of the community because of noise, litter, and illicit activities generated by them. [Deposition of Bryce Kelley, exhibit 2, McKenna report, p. 1]

In summary, we hold that the trial court did not err by applying rational basis scrutiny to plaintiff's ordinance*619 and finding that it was constitutionally valid and enforceable. *Jott, supra* at 545-548, 569 N.W.2d 841. Moreover, MCR 7.215(J)(1) requires this Court to follow *Jott, supra.* Under *LaRue* and its progeny, as modified by *44 Liquormart,* a state may exercise its inherent police powers and constitutionally regulate appropriate places where liquor may be sold, including prohibiting nudity at establishments with liquor licenses. "[T]he State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." *44 Liquormart, supra* at 515, 116 S.Ct. 1495. Finally, even if we apply intermediate level scrutiny to plaintiff's ordinance, we still find it to be a constitutional content-neutral time, place, and manner regulation that is designed to combat adverse secondary effects of the combination of alcohol and nudity and that allows for reasonable alternative avenues of communication. *Iacobucci, supra* at 96-97, 107 S.Ct. 383; *Jott, supra* at 527, 545-546, 569 N.W.2d 841.

C. A Disputed Material Fact Issue Does Not Require A Trial

Defendant also argues that there is no evidence in the record of adverse secondary effects from defendant's business and that it presented evidence that there are no adverse secondary effects from adult entertainment in general, or from defendant's business in particular. At a minimum, defendant argues that a sufficient question of fact existed concerning such secondary effects to avoid the grant of summary disposition. We disagree.

A municipality may adopt an ordinance to address its concern regarding adverse effects it reasonably believes may occur to the community in the future. In *Jott, supra* at 528-

529, 569 N.W.2d 841, this Court rejected the claim that defendant Clinton Township had not justified its *620 zoning ordinance restricting locations of adult entertainment uses "because, at the time the ordinance was enacted, not a single adult use existed in the township and because defendant never conducted its own independent study regarding the impact of adult uses in the community." The *Jott* panel relied on *Renton, supra,* where the Supreme Court upheld the constitutionality of a zoning ordinance restricting adult motion picture theaters opining:

> "We hold that Renton was entitled to rely on the experiences of Seattle and other cities ... in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." [**129*Jott, supra* at 529, 569 N.W.2d 841, quoting *Renton, supra* at 51-52, 106 S.Ct. 925.]

In both *Renton* and *Jott* the municipality considered the experience of other cites with adult entertainment business. *Renton, supra* at 50, 106 S.Ct. 925; *Jott, supra* at 529, 569 N.W.2d 841. Further, the United States Supreme Court held that the city of Renton could rely on the "detailed findings" of adverse secondary effects of adult entertainment businesses in an appellate decision[6] addressing the type of ordinance at issue. *Renton, supra* at 51, 106 S.Ct. 925. In *Pap's, supra,*

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[6] *Northend Cinema, Inc. v. Seattle,* 90 Wash.2d 709, 585 P.2d 1153 (1978).

the plurality opinion recognized that the ordinance of the city of Erie prohibiting public nudity (effectively banning nude dancing without pasties and G-strings) was aimed at combating crime and other negative secondary effects "which we have previously recognized are 'caused by *621 the presence of even one such' establishment." *Pap's, supra* at 291, 120 S.Ct. 1382 quoting *Renton, supra* at 47-48, 50, 106 S.Ct. 925. The Court observed that "[e]ven in cases addressing regulations that strike closer to the core of First Amendment values, we have accepted a state or local government's reasonable belief that the experience of other jurisdictions is relevant to the problem it is addressing." *Pap's, supra* at 297, 120 S.Ct. 1382 citing *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 393 n. 6, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (applying "exacting scrutiny" and upholding Missouri's campaign finance legislation against First Amendment challenge). And the Court noted that *O'Brien, supra,* which applied intermediate scrutiny to federal legislation banning draft card burning, "required no evidentiary showing at all that the threatened harm was real." *Pap's, supra* at 299, 120 S.Ct. 1382. Clearly, plaintiff was not required to demonstrate that nude dancing in establishments selling alcohol caused adverse secondary effects by conducting an empirical study in the community before adopting its ordinance.

We also reject defendant's argument that an affidavit by its expert, Dr. Daniel Linz, cast sufficient doubt on studies finding adverse secondary effects from adult entertainment businesses to create an issue of material fact requiring trial. Dr. Linz opined that "there is absolutely no *properly* conducted studies or research that establish or demonstrate that exotic dance clubs which serve alcoholic beverages engender *sufficient* 'secondary effects' so as to warrant the

enactment" of plaintiff's ordinance.[7] Dr. Linz also *622 noted his work was submitted to the Supreme Court in *Pap's, supra,* in an amicus curiae brief, and that Justice O'Connor (plurality opinion) and Justice Souter (concurring and dissenting) commented on it. In that regard, Justice O'Connor wrote: "In *Nixon,* however, we flatly rejected that idea [to require an empirical study to support the city's conclusion concerning adverse secondary effects] ... (noting that the 'invocation of academic studies said to indicate' that the threatened harms are not real is insufficient to cast doubt on the experience of the local government)." *Pap's, supra* at 300, 120 S.Ct. 1382 citing and quoting *Nixon, supra* at 394, 120 S.Ct. 897. Moreover, as already discussed, this Court held in *Jott* that a rational basis exists for banning nudity from establishments licensed to sell alcohol. No further evidentiary showing by plaintiff was necessary in this case where plaintiff's ordinance and the one this Court held to be "constitutionally valid and **130 enforceable" were, in pertinent part, identical. *Jott, supra*NK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=595&FindType=Y&SerialNum=1997151740" at 548, 569 N.W.2d 841.

D. An Injunction Enforcing Plaintiff's Ordinance Is Not A "Prior Restraint"

Defendant next argues that the issuance of a permanent injunction is an unconstitutional prior restraint of expression protected by the First Amendment. We disagree.

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[7] Affidavit of Dr. Daniel Linz, ¶ 9, exhibit D, defendant's response to plaintiff's motion for summary disposition (emphasis added).

"Any system of prior restraints on expression bears a heavy presumption against its constitutional validity." *Cadillac v. Cadillac News & Video, Inc.*, 221 Mich.App. 645, 649, 562 N.W.2d 267 (1997), citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). The term "prior restraint" is used to describe an administrative or judicial order that forbids*623 certain communications in advance of the time that the communications are to occur. *Alexander v. United States*, 509 U.S. 544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993). Temporary restraining orders and permanent injunctions, which actually forbid speech activities, are classic examples of prior restraints. *Id.* Prior restraints usually arise in efforts by the government to suppress obscenity. See, e.g., *Cadillac News & Video, supra.* In *Freedman v. Maryland*, 380 U.S. 51, 58-59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), the Supreme Court held that the First Amendment required procedural safeguards to guard against suppression of protected speech when attempting to ban unprotected speech. The *Freedman* Court held unconstitutional a state system for the licensing of movies, holding "because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Id.* at 58, 85 S.Ct. 734. To pass constitutional muster a prior restraint of unprotected expression must meet three conditions:

> *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured. [*Southeastern*

Promotions, Ltd. v. Conrad, 420 U.S. 546, 560, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), summarizing *Freedman, supra.*]

Defendant relies on YPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1980105866" *Vance v. Universal Amusement Co., Inc.,* 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980), to support the argument that the injunction here is a prior restraint. In *Vance,* the Supreme Court *624 held a Texas statute unconstitutional on the basis that it authorized an invalid prior restraint because it permitted enjoining the future showing of films that had not yet been found to be obscene when a movie theater had exhibited obscene films in the past. *Id.* at 316, 100 S.Ct. 1156. The Court held that the fact that a judge had issued the injunction in *Vance* did not save the statute from constitutional infirmity and that "the absence of any special safeguards governing the entry and review of orders restraining the exhibition of named or unnamed motion pictures, without regard to the context in which they are displayed, precludes the enforcement of these nuisance statutes against motion picture exhibitors." *Id.* at 317, 100 S.Ct. 1156.

Although being "'in a state of nudity' is not an inherently expressive condition," *Pap's, supra* at 289, 120 S.Ct. 1382 nonobscene nude dancing may be a form of expression falling within the outer limits of protection by the First Amendment, *Jott, supra* at 526, 569 N.W.2d 841, citing *Barnes, supra* at 565-566, 111 S.Ct. 2456. **131 On the other hand, the First Amendment does not protect nude dancing involving lewd, sexual activity. *Michigan ex rel Wayne Co. Prosecutor v. Dizzy Duck,* 449 Mich. 353, 360-361, 365, 535 N.W.2d 178 (1995). So a censor's effort to ban nude dancing

because it is obscene may experience difficulties in separating nonobscene expressive conduct from obscene nude dancing. Defendant's argument fails because neither plaintiff's ordinance nor the injunction at issue here totally bans nude dancing on the basis that it is obscene; the ordinance and the order to comply with the ordinance only prohibit nude dancing at a place where liquor is sold. *Jott, supra* at 538, 569 N.W.2d 841. The "'critical fact is that [the ordinance and the injunction enforcing it] has not forbidden *625 [nude dancing] across the board.'" *Id.*, quoting *LaRue, supra* at 118, 93 S.Ct. 390.

In *Danish News Co. v. Ann Arbor,* 517 F.Supp. 86 (E.D.Mich., 1981), affirmed without opinion 751 F.2d 384 (C.A.6, 1984), Judge Patricia A. Boyle, then a United States District Court judge, and later a Michigan Supreme Court Justice, declined to entertain the plaintiff's constitutional challenge to a zoning ordinance of the city of Ann Arbor restricting locations of "adult entertainment business." Finding the zoning ordinance constitutional, the state trial court granted Ann Arbor a preliminary injunction because the plaintiff's business, an adult bookstore, was a nonconforming use that constituted a nuisance per se. *Id.* at 88. This Court and our Supreme Court denied the plaintiff's application for leave to appeal. *Id.* Like defendant, the plaintiff in that case argued that *Freedman, supra,* together with *Vance, supra,* "require the conclusion that where a nuisance per se statute is applied to first amendment activity an injunctive order in accordance with the statute is a prior restraint." *Danish News, supra* at 92. But Judge Boyle found that enjoining a violation of Ann Arbor's zoning ordinance was materially distinguishable from enjoining the future showing of films under the nuisance statute in *Vance,* which was aimed at obscenity, because the statute in *Vance* "presented the usual problem of discerning the fine line between obscenity which

is not protected by the first amendment [sic] and ... material which does not meet the definition of obscenity and, therefore, enjoys first amendment protection." *Danish News, supra* at 93. In contrast, a zoning ordinance "does not purport to forbid display or sale of obscenity but rather defines a particular *626 type of business which may admittedly have first amendment protection and simply regulates the location of the business." *Id.* Thus, Judge Boyle opined:

> Because the zoning ordinance does not rely on the fine line between obscenity and protected first amendment material, certain of the reasons for the strict safeguards of *Freedman* evaporate. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59, 95 S.Ct. 1239, 1246-47, 43 L.Ed.2d 448. The question is rather one of applying the plain terms of the constitutional ordinance to the situation at hand to determine whether the activity of the alleged violator is covered by the zoning ordinance. [*Danish News, supra* at 93.]

Thus, the instant case is not one where procedural safeguards are invoked because it is not necessary to draw the fine line between obscene and nonobscene nude dancing. The plain terms of plaintiff's constitutional ordinance are simply applied to the undisputed facts, i.e., that defendant provided nude dancing at its establishment licensed to sell alcohol. Enforcement of plaintiff's content-neutral, constitutional ordinance is simply not a prior restraint. In *Benton Co. v. Kismet Investors, Inc.*, 653 N.W.2d 193 (Minn.App., 2002), the **132 court affirmed the lower court's finding that the defendant's business offering nude dancing violated the county's zoning ordinance, and therefore, affirmed the issuance of a permanent injunction. The ordinance had

previously been held to be a constitutionally valid time, place, and manner regulation. *Id.* at 194, 198, citing *Kismet Investors, Inc. v. Benton Co.*, 617 N.W.2d 85, 93-95 (Minn.App., 2000). See, also, *Village of Winslow v. Sheets*, 261 Neb. 203, 622 N.W.2d 595 (2001) (upholding the constitutionality of a village ordinance banning totally nude dancing and affirming *627 the issuance of a permanent injunction enforcing the ordinance), and *Colorado v. 2896 West 64th Avenue*, 989 P.2d 235 (Colo.App., 1999) (upholding issuance of a permanent injunction prohibiting nude entertainment as a nuisance contrary to a local ordinance, previously found constitutional, that regulated places where nude entertainment could be provided). Accordingly, we hold that the issuance of an injunction to enforce Van Buren Township's constitutionally valid ordinance does not violate the First Amendment as a prior restraint without procedural safeguards.

E. The Overbreadth Doctrine

Defendant argues that the township's prohibition of nudity in establishments that serve alcohol is unconstitutionally overbroad because it bans even plunging necklines and thongs and "legitimate" nude or seminude theatrical performances (*Hair*, *Oh! Calcutta*, *Salome*, and *Dance*). Also, defendant notes that the ordinance does not distinguish between male or female nudity and argues that the ordinance even extends to exposure of body parts in the restroom of any bar in the township. Defendant contends that a ban on nudity must be no greater than necessary to address harmful secondary effects and that restrictions beyond "pasties and G-strings" limit the erotic message of dancers, rendering the ordinance overbroad. We disagree.

We review de novo whether a statute or ordinance is unconstitutional under the doctrines of vagueness or overbreadth. *Boomer, supra* at 538, 655 N.W.2d 255; *People v. Rogers,* 249 Mich.App. 77, 94, 641 N.W.2d 595 (2001). We hold that plaintiff's ordinance is not unconstitutionally overbroad because there is no real and substantial*628 possibility that it will deter others not before the Court from engaging in protected expressive conduct-nude dancing at establishments not licensed to sell liquor. *Id.* at 96, 641 N.W.2d 595.

The constitutional doctrines of vagueness and overbreadth both curb arbitrary and discriminatory enforcement but are nonetheless distinct. *Plymouth Charter Twp. v. Hancock,* 236 Mich.App. 197, 199-200, 600 N.W.2d 380 (1999). The doctrines are often considered together because they are closely related, especially where claims of First Amendment violations are raised. *Id.* at 200, 600 N.W.2d 380, citing *Grayned v. Rockford,* 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (a vague statute may deter protected speech). There are three grounds on which a statute may be held to be void because it is vague or overbroad. *Burns v. Detroit (On Remand),* 253 Mich.App. 608, 625, 660 N.W.2d 85 (2002), mod 468 Mich. 881, 661 N.W.2d 231 (2003). A statute may be void for vagueness where: "(1) it does not provide fair notice of the conduct proscribed; (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed; and (3) its coverage is overly broad and impinges on First Amendment freedoms." *People v. Morey,* 230 Mich.App. 152, 163, 583 N.W.2d 907 (1998), aff'd 461 Mich. 325, 603 N.W.2d 250 (1999).

**133 A facial challenge to an ordinance on the ground that it is overbroad rests on the "prediction that third parties

will refrain from protected expression because of the [ordinance]." *In re Chmura,* 461 Mich. 517, 530, 608 N.W.2d 31 (2000). But "'there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially *629 challenged on overbreadth grounds.'" *Id.* at 531, 608 N.W.2d 31, quoting *Los Angeles City Council v. Taxpayers for Vincent,* 466 U.S. 789, 801, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). Moreover, particularly where expressive conduct, and not mere speech, is involved, "'the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" *Hill v. Colorado,* 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). See, also, *Burns, supra* at 626-627, 660 N.W.2d 85, and *Morey, supra* at 164, 603 N.W.2d 250. But the "'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" *Rogers, supra* at 96, 641 N.W.2d 595, quoting *Taxpayers for Vincent, supra* at 800, 104 S.Ct. 2118.

In analyzing defendant's overbreadth challenge, we note that nudity is not protected expressive conduct, it is erotic nude dancing that is expressive conduct at the outer edges of the protection afforded by the First Amendment. *Pap's, supra* at 289, 120 S.Ct. 1382. Also, unlike the defendant city's public decency ordinance in *Triplett Grille, Inc. v. Akron,* 40 F.3d 129 (C.A.6, 1994), on which defendant relies, plaintiff's ordinance does not ban nudity in all public places. The ban is limited to establishments that serve alcohol, *Jott, supra* at 540, 569 N.W.2d 841. That the ordinance broadly covers both male and female nudity does not imply an infirmity but, rather, reinforces the content-

neutral aim of the ordinance to "eradicate the effects of 'undesirable behavior' stemming from a combination of alcohol and nudity." *Jott, supra* at 545-546, 569 N.W.2d 841. The "comprehensiveness of the statute is a virtue, not a vice, because it is evidence *630 against there being a discriminatory governmental motive." *Hill, supra* at 731, 120 S.Ct. 2480. And tavern patrons using restroom facilities are generally not engaged in expressive conduct. The plain and legitimate sweep of the ordinance is to regulate trafficking in liquor by applying a prophylactic rule banning sexually explicit entertainment at licensed bars, cabarets, or taverns. *Jott, supra* at 540, 569 N.W.2d 841, citing *Felix v. Young,* 536 F.2d 1126, 1132 (C.A.6, 1976). The ordinance simply does not present a real and substantial danger of sweeping within its ambit the presentation of theatrical productions that involve nudity; nor do the other hypothetical situations defendant imagines present a real and substantial danger of chilling protected speech. Accordingly, plaintiff's ordinance is not constitutionally overbroad. *Hill, supra* at 722-723, 120 S.Ct. 2480; *Rogers, supra* at 96, 641 N.W.2d 595.

Our conclusion is further supported by the presumption of constitutional validity, *Burns, supra* at 627-628, 660 N.W.2d 85, and by the binding precedent of *Jott, supra.* Plaintiff's ordinance is identical to the ordinance held constitutional in *Jott* after this Court severed parts of the ordinance not reasonably related to the legitimate governmental interest involved. *Id.* at 548, 569 N.W.2d 841. Although *Jott* did not extensively analyze the overbreadth issue, it reversed the trial court's determination that Clinton Township's ordinance was constitutionally overbroad. **134*Jott, supra* at 537, 548, 569 N.W.2d 841. Under MCR 7.215(J)(1), the *Jott* Court's rejection of an overbreadth challenge binds this Court.

F. The Vagueness Doctrine

Defendant also argues that plaintiff's ordinance is unconstitutionally vague because a person of ordinary *631 intelligence cannot know what is prohibited, and no guidelines are provided to law enforcement. We again disagree.

"An ordinance is unconstitutionally vague if it (1) does not provide fair notice of the type of conduct prohibited or (2) encourages subjective and discriminatory application by delegating to those empowered to enforce the ordinance the unfettered discretion to determine whether the ordinance has been violated." *Hancock, supra* at 200, 600 N.W.2d 380. When a statute or ordinance is challenged on the ground that it is unconstitutionally vague, a court must review the entire text of the law, giving its words their plain ordinary meanings. *Rogers, supra* at 94, 641 N.W.2d 595; *Morey, supra* at 163, 583 N.W.2d 907. An ordinance is not vague if "'it is clear what the ordinance as a whole prohibits.'" *Hill, supra* at 733, 120 S.Ct. 2480 quoting *Grayned, supra* at 110, 92 S.Ct. 2294. An ordinance provides fair notice when persons of ordinary intelligence have a reasonable opportunity to know what is prohibited. *People v. Noble,* 238 Mich.App. 647, 652, 608 N.W.2d 123 (1999). Thus, an ordinance "is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *Id.*

The plain meaning of the words of the ordinance makes clear to persons of ordinary intelligence that it prohibits "nudity" in "any establishment licensed or subject to licensing by the Michigan Liquor Control Commission." Subsection 6-69(1), Van Buren Charter Township Code of Ordinances. See also *Jott, supra* at 536, 569 N.W.2d 841. Contrary to

defendant's argument, a person of ordinary intelligence is not required to guess at the meaning of "nudity." And what the ordinance as a *632 whole prohibits is easily understood by persons of ordinary intelligence. Laws written in words cannot achieve the precision of a mathematical formula. *Hill, supra* at 733, 120 S.Ct. 2480; *Grayned, supra* at 110, 92 S.Ct. 2294. But it is clear that the ordinance as a whole prohibits nudity at establishments licensed to sell alcohol. Finally, because the ordinance is not vague, it does not confer unfettered discretion to those empowered to enforce the ordinance to determine whether it has been violated. *Owosso, supra* at 217, 657 N.W.2d 538; *Hancock, supra* at 200, 600 N.W.2d 380.

G. Due Process

Defendant raises one other constitutional issue in the course of arguing that state law preempts plaintiff's ordinance: that its liquor license, together with entertainment and topless entertainment permits, constitute a property interest that cannot be taken without due process of law. Defendant waived this issue because it was not included in defendant's statement of questions on appeal. MCR 7.212(C)(5); *Persinger v. Holst,* 248 Mich.App. 499, 507 n. 2, 639 N.W.2d 594 (2001). Nevertheless, this Court may consider an issue raised in a nonconforming brief if it is one of law and the record is factually sufficient. *McKelvie v. Auto Club Ins. Ass'n,* 203 Mich.App. 331, 337, 512 N.W.2d 74 (1994). We briefly address this issue, and conclude it has no merit. *See, e.g., Joerger v. Gordon Food Service, Inc.,* 224 Mich.App. 167, 172, 568 N.W.2d 365 (1997).

**135 Defendant's argument relies on *Bundo, supra,* which held a holder of a liquor license "has a 'property' interest in the renewal of his liquor license such that before he

may be deprived of this interest he must be afforded rudimentary due process." *633*Bundo, supra* at 704, 238 N.W.2d 154. Reliance on *Bundo* is misplaced. No denial, nonrenewal, or revocation of a liquor license was involved in this case. Instead, Van Buren Township enacted an ordinance pursuant to its broad police powers to protect the health, safety, and welfare of the public. While no person may be deprived of life, liberty, or property without due process of law, U.S. Const., Am. V; Const. 1963, art. 1, § 17; *Tolksdorf v. Griffith,* 464 Mich. 1, 7, 626 N.W.2d 163 (2001), no one has a vested right to the continuation of an existing law by precluding the amendment or repeal of the law, *Rookledge v. Garwood,* 340 Mich. 444, 457, 65 N.W.2d 785 (1954). A vested right is "an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice." *Detroit v. Walker,* 445 Mich. 682, 699, 520 N.W.2d 135 (1994). But an interest "'cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws.'" *Id.*, quoting *Minty v. Bd. of State Auditors,* 336 Mich. 370, 390, 58 N.W.2d 106 (1953). That is the case here; consequently, defendant's argument fails on the merits.

V. Conclusion

The trial court did not abuse its discretion in finding no basis for judicial disqualification. We also hold that under the totality of the circumstances, due process did not require judicial disqualification. We conclude that state law does not preempt Van Buren Township's ordinance. Finally, we hold that Van Buren Township's ordinance is constitutional and enforceable. Accordingly, we affirm the trial court's *634 grant of summary dispositioApril 6, 2007n and the issuance of a permanent injunction enforcing the ordinance.